



POLICE DEPARTMENT CITY OF NEW YORK

July 6, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Jonathan Suero
Tax Registry No. 951308
Housing PSA 4
Disciplinary Case No. 2016-15693

Charges and Specifications:

1. Police Officer Jonathan Suero, on or about January 8, 2016, at approximately 2300, while assigned to PSA 4 and on duty, in the vicinity of of [sic] [REDACTED] [REDACTED] wrongfully used force, in that he struck Person A with a radio without police necessity.
P.G. 203-11 - USE OF FORCE
2. Police Officer Jonathan Suero, on or about January 8, 2016, at approximately 2300, while assigned to PSA 4 and on duty, in the vicinity of [REDACTED], was discourteous, in that, without sufficient legal authority, he video recorded Person A while Person A cried.
P.G. 203-09, Page 1, Paragraph 2 - DISCOURTESY

Appearances:

For CCRB-APU: Andre Applewhite, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, NY 10007

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

Hearing Dates:

June 2 & 8, 2017

Decision:

Not Guilty of Specification 1 and Guilty of Specification 2.

Trial Commissioner:
ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 2 and June 8, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. CCRB called Investigator John Butler as a witness. Respondent called Police Officer Jonathan Epps as a witness and Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of Specification 1 and Guilty of Specification 2 of the charged misconduct.

FINDINGS AND ANALYSIS

It is undisputed that on January 8, 2016, at approximately 11:00 pm, Respondent was on duty, assigned to PSA 4, as a Conditions officer. He was in plain clothes, working with a partner, Police Officer, Jonathan Epps. Respondent and Officer Epps were in the vicinity of [REDACTED] when they saw a person known to them, Person A. They followed Person A into a store. It is disputed as to whether Respondent hit Person A with his radio while he was in the store and whether Respondent used his cell phone to video record Person A. Person A did not appear at trial to testify. His interview with a CCRB investigator was admitted into evidence. In his statement, Person A indicated that on January 8, 2016, he

was 14 years old and lived near a store called the [REDACTED]. (CCRB Ex. 1A, 2, 20, 24) He was walking to the store to buy some food when he saw Respondent and his partner start to follow him. (CCRB Ex. 1A, 3, 23) Person A stated that he has seen this officer (Respondent), "like every day." (CCRB Ex. 1A, 11-12) About a minute after Person A entered the store he saw Respondent walk in behind him. Person A went to the back of the store to pick up some chips and juice. Person A stated the Respondent approached him, mumbled something, and hit him twice on the tip of his elbow with his radio. (CCRB Ex. 1A, 3-4, 25-27) When asked by the investigator if this hurt, Person A replied that it did because he was hit with the battery part of the radio, but he also said that he did not sustain any injuries. (CCRB Ex. 1A, 27). Person A further stated that Respondent started to record him on his phone because he was crying. (CCRB Ex. 1A, 5) Person A got what he wanted from the store and when he went to leave the store, the Respondent's partner pushed him in his chest twice. (CCRB Ex. 1A, 7, 30, 34) When Person A did leave the store, he heard Respondent say something about his father, but he forgot what he said. Person A then went [REDACTED] to tell his mother what happened. (CCRB Ex. 1A, 6, 34) Person A stated that about two minutes later he returned to the store and asked the store clerk to rewind the surveillance video. Person A used his cell phone to record portions of the video. (CCRB Ex. 1A, 36)

John Butler, a CCRB investigator, testified that when he interviewed Person A he obtained two video clips from his cell phone. Those were admitted into evidence. (CCRB Ex. 2A and 2B) On cross-examination, Mr. Butler was questioned about the original complaint report form in the CCRB file on this case. The form, which was not drafted by Mr. Butler, was also admitted into evidence. It indicates that Person A's mother called PSA 4 on January 8, 2016, at approximately 11:10 pm and stated that Person A was pushed and cursed at by two

officers and was also aggressively grabbed by his hoodie by the officers. The report also indicates that the officers told witnesses that Person A was snitching on people in the neighborhood. There is no mention of Person A being hit by a police radio on the report form. (Respondent Ex. A)

Police Officer Jonathan Epps, Respondent's partner that evening, testified that he saw Person A, "walking at a very fast pace and he was shouting loudly ... saying like fuck and just beelining directly to the store." (Tr. 86) As he felt there was going to be, "some sort of confrontation in the store," he and Respondent headed directly for the store. (Tr. 86, 88) Officer Epps testified that he knew Person A as someone who hangs out with drug dealers and gang members in the area. He had spoken to him on several prior occasions about youth programs at PSA 4 which he could participate in, because he thought he needed, "some sort of direction and guidance." (Tr. 87-88)

Officer Epps testified that Person A entered the store, followed first by Respondent who was about five to ten feet behind him, and then by Officer Epps. Officer Epps remembers Person A being very hostile towards, and cursing at, the store clerk, asking him, "where the fuck are the honey buns?" (Tr. 89) Officer Epps then asked the store clerk if he wanted Person A to leave. After the clerk said yes, the officers asked Person A to leave. Person A threw his jacket to the ground, pulled up his shirt sleeves, balled up his fists, and motioned towards Respondent. He also spit in Respondent's direction. Officer Epps described Person A as being "belligerent" at this point. He testified that Person A was cursing and saying, "fuck you." (Tr. 90-91) The store clerk finally just told Person A to just get something, which he did, and then Officer Epps, followed by Respondent left the store. Officer Epps had no physical contact with Person A. (Tr. 92) He never saw Respondent strike

Person A with a radio, nor did he see any kind of physical altercation between them. (Tr. 92-93) He never saw Respondent with a cell phone in his hand. (Tr. 101)

On cross-examination, Officer Epps testified that while he was in the store, Respondent was in front of Person A and Officer Epps was about five to ten feet away from them speaking to the store clerk. (Tr. 97) In a matter of seconds after speaking to the clerk, Officer Epps moved towards where Respondent was. (Tr. 99)

Respondent testified that he had seen Person A more than 20 times prior to January 8, 2016. (Tr. 110) He recalled that Person A would alert local drug dealers and gang members to their presence in the area, thereby blowing the police cover. (Tr. 110-11) Person A would yell at Respondent, "Suck my dick, fuck you, hope you get shot in the face." (Tr. 111) Respondent had two prior conversations with Person A telling him that what he was doing was wrong. He also told him he should stop telling people the police were around. Respondent testified he tried to put him, "on the right path," by telling him about the Explorers program. (Tr. 111-12)

On January 8, 2016, Respondent saw Person A walk very quickly towards the store, "in an aggressive demeanor as if he was going to fight with someone or engage in some type of verbal physical altercation." (Tr. 112) Person A was yelling, "fuck you, mother fucker." Respondent and his partner followed Person A into the store to, "make sure nothing happened." (Tr. 113) Respondent entered the store before his partner. He saw Person A in the store cursing, and asking, "where the fuck are the honey buns at?" (Tr. 113) While his partner was speaking to the store clerk, Respondent went to the back of the store where Person A was. Respondent testified that the minute Person A saw him he said, "fuck you," and removed his jacket, rolled up his sleeves and made motions with his shoulder and arm like he

was going to punch Respondent. (Tr. 114) Respondent was about a foot away from Person A at this point. As Respondent was a lot bigger than Person A, he was not worried that Person A was going to physically hurt him at the time. (Tr. 114-15) Respondent kept telling Person A to leave the store, but he was not compliant. (Tr. 115) The store clerk eventually just told Person A to take a snack. Respondent started to walk out of the store at that point when Person A took some type of can and motioned as if to throw it at Respondent, so Respondent just moved out of the way and left the store. (Tr. 116-17) Respondent testified that he never hit, or tried to hit, Person A with his radio. (Tr. 117)

Respondent was shown the video in evidence. He testified that portions of his time inside the store were not shown on the video, including Person A's punch like motion and Person A's motion of starting to throw a can at Respondent. (Tr. 121-22) Respondent also testified that the video that was in evidence was an accurate representation of what happened during the particular moments memorialized on it. (Tr. 143) With regard to the portion of the video (CCRB 2A) that shows Respondent with a radio in his hand, he testified that he was speaking with his hands and just motioning Person A to leave. (Tr. 126) With regard to the portion of the video (CCRB 2B) that shows Respondent with a cell phone in his hand he testified that his phone was vibrating and when he took it out, because it had been malfunctioning, it automatically opened to the camera function. Respondent demonstrated how his phone did this at trial. He further testified that the phone was not recording and as he was walking out of the store, Respondent was just keeping his eyes on Person A, because he didn't want, "to give him a cheap shot." (Tr. 124-25)

On cross-examination, Respondent was shown the second video clip (CCRB Ex. 2B) at the time stamp of seven seconds. He acknowledged that at one point, when he had his phone out,

he was not moving towards the entrance of the store. (Tr. 135-37) He testified that it appears that the back of Person A's head is visible on the cell phone screen in the video at approximately 17 seconds. (Tr. 139-40) He also testified that it was his personal cell phone, not a department issued phone. (Tr. 138) He acknowledged that when he checked the phone after it vibrated, he did not have a phone call, a text, or an email. (Tr. 141) Respondent testified that he never saw Person A crying. (Tr. 138)

Specification 1 in this case charges Respondent with striking Person A with a radio without police necessity. Respondent has testified at trial that he motioned towards Person A with his radio, but never touched him with it. Officer Epps testified that he never saw Respondent hit Person A with a radio. Person A did not appear at trial, but we have his hearsay statement that Respondent hit him twice with the radio. We also have a video clip pertaining to this specification.

The video clip (CCRB 2A) at approximately 24 and 28 seconds does show a radio in Respondent's left hand and shows his hand making two upwards motions of approximately several inches. At the time of these motions, Respondent is standing directly in front of Person A and it is not possible to clearly see if the radio made contact with Person A. When Person A does become partially visible, at approximately 33 seconds, he is not clutching his elbow or making any other physical gestures to indicate that his elbow had been hurt as he indicated in his statement.

While Officer Epps testified that he did not see Respondent hit Person A with a radio, his testimony on this issue does not carry much weight on the central issue of whether Respondent's radio made contact with Person A since it appears to the court that he would

not have been in a position to see if any contact had been made. We are therefore left with Respondent's sworn denial and Person A's hearsay statement.

While hearsay is admissible in this forum and can be used to prove a charge, it has inherent weaknesses which require that it be given careful scrutiny. In this case, Person A does appear to have some history with Respondent and without the benefit of his testimony, the court can't determine whether any possible bias influenced his statement. Also, the video, while not conclusive, does undermine Person A's contention that he was hit twice on the elbow with what he describes as the heavy battery part of a police radio. He stated that he was hurt by the hitting and yet we don't see any physical reaction to indicate any such hurt when his elbow becomes fully visible on the video within seconds of when he claims to have been hit. Person A does not rub the elbow or touch it in any way. Without some corroboration for a potentially biased hearsay statement, I find that CCRB has not met its burden of proof with regard to Specification 1. I find Respondent Not Guilty of this charge.

With regard to Specification 2, Respondent did not testify as to any police purpose for recording Person A, but rather, denied doing so. With regard to this specification however, the court finds that the video (CCRB Ex. 2B) does serve as corroboration for Person A's hearsay statement that Respondent recorded him while he was crying. While the court can't ascertain that Person A is crying based on the video, in this case his physical actions of wiping the area of his eyes with his jacket at approximately 15 seconds support his hearsay statement that he was crying.

The video also supports Person A's statement that Respondent was recording him. The court rejects Respondent's version of events that he was just checking his vibrating phone. As is clear on the video, Respondent doesn't just take a look at the screen and then put the phone

away. As he admitted he had no call, text or email, there was no reason for Respondent to continue to hold his phone out as he does. On the video, at approximately 15 to 18 seconds, Respondent can be seen, even as he walks past Person A to hold the phone up and rotate it in a manner to keep the camera in a position to be focused on Person A. Person A is visible on the screen of Respondent's phone. Based on this, it is more likely than not that Respondent was recording Person A as he was crying. I therefore find Respondent Guilty of Specification 2.

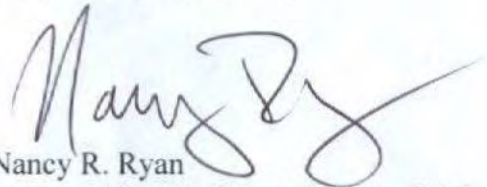
PENALTY RECOMMENDATION

In order to determine an appropriate penalty, Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974). Respondent was appointed to the Department on July 6, 2011. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

CCRB has requested a penalty of the forfeiture of seven vacation days based on the two specifications. Respondent has only been found guilty of one of the specifications. The specification was one of discourtesy to a civilian. While the court has not found any recent precedent of a situation where an officer recorded a civilian without police purpose, there is recent precedent for a case of discourtesy to a minor. An eleven-year police officer, with no prior disciplinary history, forfeited five (5) vacation days for (i) discourteously referring to a minor individual as a "fucking piece of shit," (ii) threatening to arrest said individual without sufficient legal authority by stating, "I can't wait to lock up this little piece of shit. . . As soon as you turn sixteen, you will be in central booking every single day for every little thing;" (iii) on a separate date, referring to said individual as a "fucking piece of shit;" and (iv) threatening to arrest said individual without sufficient legal authority by stating, "I'm gonna fucking pick you

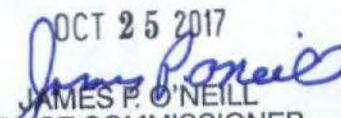
up every day for anything . . . You fucking piece of shit, you're gonna be in booking every day, just watch." Disciplinary Case No. 2015-14005, signed March 15, 2017. As the current case only involves one instance of discourtesy, based on the precedent and my review of the Respondent's disciplinary history, I recommend a penalty of the forfeiture of three vacation days.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

OCT 25 2017

JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER JONATHAN SUERO
TAX REGISTRY NO. 951308
DISCIPLINARY CASE NO. 2016-15693

Respondent was appointed to the Department on July 6, 2011. On his last three annual performance evaluations, Respondent received overall ratings of 4.5 "Extremely Competent/Highly Competent." He has been awarded three Department medals for Excellent Police Duty.

Respondent [REDACTED] has no prior formal disciplinary history.

For your consideration.

Nancy R. Ryan
Assistant Deputy Commissioner Trials